UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Milwaukee, Wisconsin

PRO-TYPE BUILDERS, INC.

Employer

and **Case 30-RC-6520**

BRIDGE, STRUCTURAL, ORNAMENTAL, REINFORCING IRON WORKERS AND MACHINERY MOVERS, LOCAL NO. 8, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION[1]

This Decision sets forth my determinations as to the issues presented by the parties.

Although there are a number of individual issues, the following issues are of central importance:

A. What unit is appropriate for the purposes of collective bargaining: the broader unit including laborers and erectors as proposed by Petitioner, or the narrower unit of only erectors as proposed by the Employer[2]?

B. Whether the election should be held now or in the summer of 2003, when the Employer's work force is at its seasonal peak?

C. Whether Foremen Herb Brown and Kelly Kennedy are excluded from the unit as supervisors under Section 2(11) of the Act.

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[1] Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a Hearing Officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned The Employer and Petitioner filed post-hearing briefs that were duly considered. The Hearing Officer's rulings made at the hearing were free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[2] Included in this determination will be the status of Irwin Jenkins, whom the Union asserts should be excluded as a "shop employee" with no community of interest with the other field employees.

D. Whether six employees are eligible to vote, because of the Employer's assertion of the employees having no expectation of continued employment.

E. Whether the *Daniel/Steiny* formula should be used to determine voter eligibility? *Daniel Construction*, 133 NLRB 264 (1961), as modified 167 NLRB 1078 (1967); *Steiny & Co*., 308 NLRB 1323 (1992).

DECISION SUMMARY

Issue A.: I find the appropriate unit to be:

> All full-time and regular part-time employees employed by the Employer out of its Green Bay and Dalton, Wisconsin facilities; excluding office/clerical employees, guards and supervisors as defined in the Act.

In finding the above unit to be appropriate, I find that Irwin Jenkins shares a community of interest with the other employees and would be left as a residual, unrepresented employee if not included in the unit; therefore, I conclude that he is eligible to vote.

Issue B.: I find that the evidence fails to show that the Employer is seasonal, as contemplated in *Dick Kelchner Excavating Co*., 236 NLRB 1414, 1416 fn. 10 (1978); and therefore, deny the Employer's motion to dismiss the petition as being untimely.

Issue C.: The record shows Herb Brown should be excluded from the unit as a Section 2(11) supervisor, but insufficient evidence has been presented to exclude Kelly Kennedy as a Section 2(11) supervisor.

Issue D.: Although employees Ken Rauls and Jeremy Heil appear to have a reasonable expectation of recall, they are currently on layoff and are eligible to vote only if they are otherwise eligible under the *Daniel/Steiny* formula. I also find that the uncontroverted testimony dictates that Dave LeGrave and Joseph Soulier have quit, and are therefore not eligible to vote. No evidence was presented to show that Curtis Wayka and Curtis Crow have quit and, assuming they meet the standards of the *Daniels/Steiny* formula, these employees are eligible to vote.

Issue E.: The Employer is an employer in the construction industry and therefore the *Daniel/Steiny* formula should be used to determine voter eligibility.

BACKGROUND

The Employer is engaged in the business of erecting pre-engineered metal buildings. It is a family run business with the following managerial staff: Arvin Koopman, president; Bart and Douglas Koopman (Arvin's sons), supervisors; and Judy Koopman (Arvin's wife), office worker[3]. The Employer has a main facility in Dalton, Wisconsin and maintains a cold storage facility in Green Bay, Wisconsin. The Employer's work complement varies from 35 in the peak construction season, to apparently having no active employees at slow times during the months of January and February. The record indicates that the Employer has approximately 20 employees whom it considers to be its core group. These 20 employees are not always actively working, but they are the first workers called back when the workload increases.

The Employer obtains work from a consistent complement of companies that sell the pre-engineered buildings and contact the Employer to erect those buildings. There is no bidding procedure for the work; the companies contact the Employer when they have a building to be erected. The work consists of installing insulation, putting up sheets, installing roofs, welding, and installing different types of support structures. Employees have varying skill levels. Although the Employer does not officially separate employees by skill level, it appears that some employees are considered erectors and others are informally labeled as laborers. Many employees started their employment as laborers and gained enough experience to advance to "erector" work. Experience is the key to receiving more responsibility and no formal test or

[3] Arvin, Bart and Douglas are stipulated to be, and I find them to be, Section 2(11) supervisors because of their ability to, inter alia, hire, fire and discipline employees.

certification is required for this promotion. The Employer's salary structure is informal and is based primarily upon experience with no identifiable classifications.

A. Appropriate Unit:

As noted above I find the following unit appropriate:

> All full-time and regular part-time employees employed by the Employer out of its Green Bay and Dalton, Wisconsin facilities; excluding office/clerical employees, guards and supervisors as defined in the Act.

The Employer argues that the unit should be limited to employees it has labeled "pre-engineered building erectors". Petitioner argues that the unit should consist of all of the field employees, excluding one employee (Irwin Jenkins), whom it considers a shop employee. The record indicates there is no discernable line of distinction between employees the Employer separately labels erectors or laborers. In the past, as laborers gradually gained knowledge and experience, they received increased job responsibility. There is no formal training to become an erector and no distinct line drawn in the pay scale for the different skilled employees. All employees work under the same supervision, have the same hours and benefits, and have extensive contact and integration.

All of the employees who currently receive the Employer's health insurance are considered erectors, but the record reflects that this is because employees must work for the Employer for a solid 90 days before qualifying for the insurance. The benefit is not automatically granted to erectors. Steve Juel, an erector, has not qualified for the insurance because he has not been employed for a solid 90 days. The employees also receive the same travel benefits regardless of their skill level. All of the Employer's non-supervisory personnel,

excluding the one office worker, share a significant community of interest and therefore a unit consisting of all employees is an appropriate unit[4].

Status of Irwin Jenkins:

I find that Irwin Jenkins shares a sufficient community of interest to be included in the unit with the other field workers. Jenkins' primary duties with the Employer appear to be that of a mechanic. The Union, contrary to the Employer who urges his inclusion, argues that Jenkins should be excluded as a shop employee having an insufficient community of interest. However, the record indicates that Jenkins often works in the field with the other employees. Jenkins' time in the field is spent engaging in various duties including: driving parts to and from sites, repairing equipment, driving forklifts, operating cranes, performing welding tasks with other employees on job sites, and performing other work often completed by the field employees. Although Jenkins is a salaried employee as opposed to hourly, he has the same benefits and supervision as the other employees. *Kalamazoo Paper Box, Inc*., 136 NLRB 134 (1962).

I note that if Jenkins is excluded from the petitioned for unit, he would be the only non-supervisory or confidential employee not represented. Given the Board's long-standing policy disfavoring a residual unit of one employee, I find that Jenkins has sufficient community of interest to be included in the unit found appropriate. *North Jersey Newspapers Company*, 322 NLRB 394 (1996).

[4] The record establishes that the erectors do not complete any formal training or apprenticeship program, their work is integrated with the work of the other employees and that the duties of the erectors are functionally integrated with those of the laborers. Therefore a separate craft unit of erectors is not appropriate. *Burns & Roe Services Corp*., 313 NLRB 1307 (1994).

B. Timing of the Election:

At the hearing, the Employer, relying on the Board's decision in *Dick Kelchner Excavating Co*. supra., moved to dismiss the petition as being untimely because of the seasonal nature of the Employer's business. In *Kelchner* the Board established an exception to the use of the *Daniel/Steiny* formula in the construction industry when the employer's business was "seasonal." Supra at 1417. The evidence presented does not establish the Employer as "seasonal" as defined in *Kelchner*; therefore, the petition is timely. The Employer states that, as in *Kelchner*, an election now would not provide a representative complement; however, the Employer's operations are distinguishable from that in the *Kelchner* decision. In *Kelchner* the Board, in rejecting the application of the *Daniel* formula, found that there was no evidence of intermittent, as opposed to seasonal employment. Id. at 1416, fn. 10. In the instant case, the evidence reveals that the majority of the Employer's employees have intermittent employment.

The Employer argues that many of its laborers are hired on a specific job with no expectation of recall. Although it appears this situation certainly occurs, it is not enough to qualify the Employer as "seasonal" justifying postponing the election. The record is replete with evidence of employees that the Employer terms as laborers, being laid off at times and returning to work again weeks later. The record also shows that many of these same laborers eventually gain the necessary experience to be informally classified as erectors. The situation in *Kelchner* involved only 10 of 45 laborers who were working at the time of the petition being filed. Id. at 1414.

The situation in the instant matter is more akin to *Baugh Chemical Company*, 150 NLRB 1034 (1965). In *Baugh,* the Board determined that if the employer is operating virtually year-round, and the year-round complement is substantial compared to the number employed during

the peak season, a postponement of the election would "unduly hamper year-round employees in the enjoyment of their rights under the Act." Id at 1036. As stated above, the Employer here maintains a core group of employees of about 20, who although they may not be employed year-round, appear to be unemployed a minimal amount of time.

In the construction industry, there will be occasions when some employees who have a substantial interest in the unit's terms and conditions of employment are not working at the time of the election. The *Daniel/Steiny* formula was created to rectify these concerns. *Steiny* at 1324. The Board, by not applying the *Daniel/Steiny* formula in *Kelchner*, found that the large group of laborers who normally work the peak season were not intermittent employees. *Kelchner* at 1416, fn. 10. The evidence in this case fails to show that a significant number of the employees hired/recalled during the peak season will not be or are not intermittent employees. Also, the evidence shows that, as in *Baugh*, the core group of employees here are a substantial complement justifying a prompt election. Therefore, the Employer's motion to dismiss the petition is denied.

C. Status of Herb Brown and Kelly Kennedy:

Petitioner argues that Brown and Kennedy are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the unit. The Employer asserts that neither are Section 2(11) supervisors, and should be eligible to vote. In *Pro-Type Builders, Inc*., 30-CA-13961, decided by Administrative Law Judge Eric M. Fine on October 28, 1999, Herb Brown was found to possess a sufficient amount of authority to qualify him as a Section 2(11) supervisor. No new evidence was presented in this record establishing that Brown has lost any or all of the authority he had at the time of the prior hearing. Furthermore, the Employer did not except to the Judge's finding of Brown's status and this decision was approved by Board Order

on December 9, 1999. *Moulton Manufacturing Company*, 152 NLRB 196 (1965). I therefore find, consistent with the Decision and Board Order, that Brown has the authority to independently assign and direct work, can approve employees to leave early, can require overtime, can transfer an employee to another location, can instruct employees to redo an assignment, and, as a result of the finding in Case 30-CA-13961, Brown can also fire employees. Brown is therefore a supervisor under Section 2(11) of the Act, and is excluded from the unit.

I find that the Petitioner has failed to meet its burden under *Kentucky River* to show that Kelly Kennedy possesses Section 2(11) supervisory authority. *NLRB vs. Kentucky River Community Care*, 121 S.Ct. 1861, 1866 (2001). The authority of Kennedy is indistinguishable from the other 3 or 4 employees that the record establishes occasionally act as foreman; the Union seeks to include those employees in the unit. Given the absence of supervisory indicia, I include Kennedy and the other individuals who act as foreman; the union seeks to include those employees in the unit. Given the absence of supervisory indicia, I include Kennedy and other individuals who act as foremen in the unit.

D. Eligibility of Six Employees in Dispute (Expectation of Continued Employment):

The Petitioner seeks to include, as eligible to vote, laid-off employees Ken Rauls and Jeremy Heil, regardless of what standard is used to determine eligibility, because the employees have a reasonable expectation of recall in the near future. The Employer believes that Rauls and Heil should not be eligible, asserting they have no expectancy of recall. I find that Rauls and Heil are eligible to vote ***only*** if they have worked the requisite number of days as required by the *Daniel/Steiny* formula as discussed below. Petitioner cites *Madison Industries*, 311 NLRB 865 (1993) to argue that Rauls and Heil should be eligible to vote even if they don't have the

requisite number of days worked under the *Daniel/Steiny* formula. *Madison Industries* analyzed whether or not two laid-off employees should be allowed to vote despite evidence that their employment relationship with the employer may have been terminated permanently. The employees in question in *Madison Industries* had clearly worked the requisite days under the *Daniel/Steiny* formula and the analysis focused on their recall rights.

That is not the case in the instant matter. Petitioner is asking to the Region to engage in exactly the type of analysis that the *Daniel/Steiny* formula was intended to avoid. In adopting the formula approach to solve these issues, the Board in *Steiny* specifically stated that "Individualized eligibility determinations necessarily would result in greatly prolonged litigation without…..sufficient improvement in the accuracy of our determinations of the reasonable expectancy of the future employment of the individuals involved." *Steiny* at 1326. The Petitioner in its brief cites footnote 6 of the *Steiny* decision to stand for the proposition that the disputed employees should be eligible to vote if they have a reasonable expectancy of employment in the near future. Id. at 1324. However, footnote 6 is mentioned in the Board's analysis of the employer and amici AGC and ABC's argument to not follow the *Daniel* formula but rather to adopt the expectancy analysis. An argument that the Board rejected.

The Employer seeks to exclude Dave LeGrave, Curtis Wayka, Curtis Crow and Joseph Soulier because the employees have quit their employment. The Petitioner argues these employees are eligible because the Employer has failed to produce evidence that any of the employees quit. I find that the uncontroverted evidence shows that LeGrave and Soulier have quit their jobs with the Employer. The Employer provided testimony that these employees quit and no evidence was presented to dispute that contention. As LeGrave and Soulier have

permanently terminated their employment relationship with the Employer, they are ineligible to vote.

The record is devoid of evidence that employees Wayka and Crow have quit; therefore these employees are eligible to vote assuming they meet the *Daniel/Steiny* standards[5].

E. Appropriateness of *Daniel/Steiny* formula:[6]

I find that the Employer is a construction industry employer and therefore, under *Steiny,* the *Daniel* formula must be used to determine eligibility. *Steiny* at 1327. As described above, the Employer works on different jobsites installing insulation, putting up sheets, installing roofs, welding, and installing different types of support structures in addition to other types of work clearly defined as construction. This conclusion is also supported by the Employer admitting in *Pro-Type Builders, Inc*. 30-CA-13961 that it was "a corporation, ..engaged in the business of general construction."

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on

[5]The Employer's brief identifies Randy Norton as another employee who it is contesting as having quit, however, the eligibility of Norton was not raised at the hearing and the record fails to support the Employer's contention that Norton is not a current employee of the Employer.

[6] The Employer does not argue in its brief that it is not in the construction industry. The Employer's argument against the application of the *Daniel* formula in this matter appears to be based upon the Board's decision in *Kelchner* and the timeliness argument discussed above.

vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced[7]. Also, eligible to vote shall be all employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months preceding the eligibility date for the election or who have had some employment in that period and who have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. *Steiny and Company, Inc*., 308 NLRB 1323 (1992); *Daniel Contruction Co*., 133 NLRB 264 (1961). Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Bridge, Structural, Ornamental, Reinforcing, Iron Workers and Machinery Movers, Local No. 8, AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them. *Excelsior*

[7] Inasmuch as the Employer is engaged in the construction industry, the eligibility of employees to vote in the election shall be determined by the eligibility formula set forth in the Direction of Election.

Underwear, Inc., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company,* 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, Suite 700, Henry S. Reuss Federal Plaza, 310 West Wisconsin Avenue, Milwaukee, Wisconsin 53203 on or before March 7, 2003.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by March 14, 2003.**

Signed at Milwaukee, Wisconsin on this 28th day of February 2003.

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